LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 26 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1063

DIANA KEARNY POWELL, *Petitioner*

v.

NICHOLAS KATZENBACH, Attorney General of the United States, HENRY H. PAIGE and JOHN E. POWELL, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIANA KEARNY POWELL,
Petitioner pro se
1500 Massachusetts Ave., N. W.
Washington, D. C. 20005
Attorney at Law.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

DIANA KEARNY POWELL, *Petitioner*

v.

NICHOLAS KATZENBACH, Attorney General of the United States, HENRY H. PAIGE and JOHN E. POWELL, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that Writs of Certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit, entered December 2,

1965, in Appeal No. 19,285, *Powell* v. *Katzenbach;* and entered December 9, 1965, in Appeal No. 19,547, *Powell* v. *Paige, et al.*

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia in each case is unreported.

The opinion in Appeal No. 19,285, *Powell* v. *Katzenbach,* has not yet been officially reported. (1a) It is unofficially reported January 3, 1966, at 94 W.L.R. 1.

The opinion in Appeal No. 19,547, *Powell* v. *Paige, et al.,* has not yet been officially reported. (3a)

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1254(1), and under the Constitution of the United States, Article III, Sec. 2, providing for appellate jurisdiction in cases arising under the Constitution and laws of the United States. p. 3.

Review is sought of two judgments of the United States Court of Appeals for the District of Columbia Circuit, as follows:

1. Judgment entered December 2, 1965, in Appeal No. 19,285, *Powell* v. *Katzenbach* (1a)

2. Judgment entered December 9, 1965, in Appeal No. 19,547, *Powell* v. *Paige, et al.,* (3a)

QUESTIONS PRESENTED

1. Does the discretionary power vested in the Attorney General of the United States extend to arbitrary refusal to prosecute embezzlement of trust funds in custody of a bank in violation of U.S.C. Title 18, Ch. 31, sec. 645, 656, Ch. 47, sec. 1005?

2. May the defense of *res judicata* be interposed as a defense in related civil actions on the basis of a judgment obtained by fraud and misrepresentation by which vested property has been converted from the rightful owner in violation of Amendment 5 of the Constitution of the United States?

CONSTITUTION, STATUTES

Constitution of the United States, Amendment 5:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

United States Code, Title 5, sec. 311a:

> . . . the Attorney General . . . shall have authority to investigate any violation of Title 18 involving government officers and employees.

United States Code, Title 18:

Ch. 1, Sec. 2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, secs. 17b, 65 Stat. 717.

Ch. 31, Sec. 645:

Whoever, being a United States marshall, clerk, receiver, referee, *trustee,* or other officer of a United States Court, or any deputy, assistant, or employee of any such officer, retains or converts to his own use or to the use of another or after demand by the party entitled thereto, unlawfully retains any money coming into his hands by virtue of his official relation, position or employment, is guilty of embezzlement . . .

Ch. 31, Sec. 656:

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any

Federal Reserve bank, member bank, national bank or insured bank, . . . embezzles, abstracts, purloins or willfully misapplies . . . moneys, funds, assets or securities entrusted to the custody or care of such bank, . . .

Ch. 47, Sec. 1001:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry . . .

Ch. 47, Sec. 1005:

Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person . . .

STATEMENT OF THE CASE

In *Powell* v. *Katzenbach,* Civil Action 207-65, Complaint in the nature of mandamus was brought in the United States District Court for the District of Columbia seeking prosecution by the Attorney General of the United States against a bank and certain others for violation of provisions of the United States Criminal Code set forth in the Complaint, consisting of deliberate misrepresentations of facts of record and the law to aid fraud and embezzlement. RA2-4. Motion to Strike two paragraphs and to Dismiss the Remainder of the Complaint was granted March 8, 1965, on the ground the Complaint was without foundation in fact and the matter within the discretion of the Attorney General. RA2, 10. Timely appeal was taken to the United States Court of Appeals for the District of Columbia Circuit, Appeal No. 19,285, which affirmed the Judgment of the District Court as to the Motion to Dismiss on the ground

the bringing of criminal actions is discretionary with the Attorney General, December 2, 1965. (App. 1).

In *Powell* v. *Paige et al.*, Civil Action 296-65, Complaint for fraud was brought in the United States District Court against persons named in or associated with the matters complained of in *Powell* v. *Katzenbach*. RB2. Motion to dismiss on the ground of res judicata RB2 was granted April 6, 1965. RB9. Timely appeal was taken to the United States Court of Appeals for the District of Columbia Circuit, Appeal No. 19,547, and the Judgment of the District Court affirmed, December 9, 1965. (App. 3).

The factual basis for both these actions was the deliberate misrepresentation and fraud by The National Savings and Trust Company and others, the bank being appointed Successor Trustee in Civil Action 4051-55 of the estate of Diana Kearny Powell, deceased, of a trust set up in her will, Administration No. 12,657, by which it presses false claims against the remainder which are in patent conflict with the provisions of the will and its own position as trustee, by which it has embezzled the remainder estate vested in petitioner, the only remainderman in esse at termination of the trust on September 1, 1958, in violation of her right under Amendment 5 of the Constitution of the United States. This was accomplished by fraudulent misrepresentations to the Court and in Orders of Court drawn by attorneys for the bank and its agents deliberately setting forth patently false statements of fact and law, which were incorporated into the judgments of the Court, the Bank and its agents subsequently relying upon the Judgments so obtained as authority for their fraudulent acts.

Henry H. Paige and John E. Powell have admitted on several occasions that as attorneys for the bank they were responsibile for raising the spurious claims.

ARGUMENT

I.

The question of whether the Attorney General has unlimited discretion arbitrarily to ignore serious violations of the Criminal Code of the United States is a question which has not been, but should be decided by this Court, the violations including corruption and fraud by a Bank and certain judges of United States Courts.

Title 5 U.S.C. sec. 311a assigns to the Attorney General of the United States the duty of investigating and prosecuting any violation of Title 18 of the United States Code involving Government officers or employees, and provides that any allegations of complaint received by any agency of the Executive Branch of the Government relating to such violations be referred to the Attorney General. Fraud committed by a federally insured bank or its agents, or against property held in the custody of such a bank, comes within the provisions of Title 18. (Pet. 3, 4).

The United States Attorney General has simply ignored the plain facts of record in claiming lack of foundation for the charges.

Petitioner submits that she is not required to make out a complete criminal case in her Complaint in the nature of mandamus to obtain the action of the Attorney General to prosecute a crime that shocks the conscience and brings into disrepute both the banking system and the integrity of the Courts as instruments of justice, by use of the judicial process to perpetrate embezzlement. Petitioner submits that prosecution of flagrant and serious crime is not within the range of discretionary powers, but is controlled by the Statutes.

II.

This Court should review the decisions of the Court below holding as res judicata defenses in reliance upon a decision riddled with misstatements of fact and in direct conflict with prior decisions and of well-settled law, by which respondent is deprived of vested property by fraud and embezzlement, in violation of Amendment 5.

Respondents Henry H. Paige and John E. Powell have admitted raising the spurious question as to distribution, but continue to rely on the decision incorporating their deliberate misrepresentations of fact and law to sustain a false claim depriving petitioner of vested property, in violation of Amendment 5 of the Constitution of the United States.

The limitation on the doctrine of res judicata is defined at 30A *Am. Jur.* at page 399:

> . . . It is generally held that the principles of res judicata may not be invoked to sustain fraud, and that a judgment obtained by fraud or collusion may not be used as a basis for the application of the doctrine of res judicata. *New Orleans* v. *Gaines (New Orleans* v. *Whitney)* 138 U.S. 593, 34 L.ed. 1102, 11 S.Ct. 428; *Welsh* v. *Mandeville,* 1 Wheat. 233, 4 L.ed. 79.

The prior decision upon which Respondents rely, *Powell* v. *National Savings and Trust Co. (Powell* v. *Powell, and Estate of Diana Kearny Powell,* deceased) 111 U.S. App. D.C. 290, 296 F.2d 412, cer. denied 368 U.S. 946, 7 L.ed. 2d 343, 82 S.Ct. 387, rehearing denied 368 U.S. 1005, 7 L.ed. 2d 547, 82 S.Ct. 597, while purporting to follow *Pyne* v. *Pyne,* 81 U.S. App. D.C. 11, 154 F.2d 297, in fact reverses it and the well-settled law.

Detailed analysis of patent misstatements in the Opinion of the Court below upon which Respondents rely as res judicata extends to twenty printed pages, and therefore is not included. This does not include numerous Orders

drawn by Mr. Paige misstating the facts of record by which Petitioner has been deprived of vested property.

Petition submits that this makes a mockery of due process of law and does irreparable damage to the dignity and confidence in the Courts as vehicles of justice which present special and important reasons for review by this Court.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals for the District of Columbia Circuit entered December 2, 1965, in Appeal No. 19,285, *Powell* v. *Katzenbach;* and entered December 9, 1965, in Appeal No. 19,547, *Powell* v. *Paige et al.*

DIANA KEARNY POWELL,
Petitioner pro se
1500 Massachusetts Ave., N. W.
Washington, D. C. 20005
Attorney at Law.